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No. 04-

IN THE

Supreme Court of the United States

JOHN BRENEMAN and WILLIAM D. BRENEMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Circuit Court of Appeals *per curiam* affirmed the summary judgment decision of the Court of Federal Claims denying compensation for a Fifth Amendment Takings Claim. The Fifth Amendment Takings Claim involved the taking of the surface, above the surface and at least three feet below the surface of petitioners' property by the imposition of a navigational servitude for the benefit of the public. The public use airport in an earlier action stipulated that it did not have a claim for adverse possession of petitioners' property. The Federal Circuit and the Court of Federal Claims in denying the claim improperly distinguished the Supreme Court precedent of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and ignored the airport's stipulation in deciding the petitioners lost their "right to exclude." This conclusion is inconsistent with the holding of the District of Columbia Circuits' decision that Determinations of Hazard and such navigational servitudes have no enforceable legal effect.

Three questions are presented:

1. What protection does the Fifth Amendment provide against granting the public the right of transit and excluding the private landowner from the surface and below the surface of private property by a federal agency enforceable by federal and state civil and criminal penalties.

2. Does the loss of the "right to exclude" public use of the surface and at least three feet below the surface of private property require a *per se* takings analysis under the Fifth Amendment.

3. Did the Federal Circuit and the Court of Federal Claims improperly conclude the United States took nothing despite the stipulation by the public use airport that it did not acquire rights to petitioners' property by adverse possession.

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OPINION BELOW

The Court of Appeals for the Federal Circuit's *per curiam* judgment was not reported and is included as Appendix A. The Court of Federal Claims Judgment and Opinion is published at 57 Fed. Cl. 571 (2003) and is reprinted as Appendices B & C.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Federal Circuit entered and filed its decision on May 10, 2004. A timely Application to extend the time to file a petition for writ of certiorari was granted extending your petitioners' time to and including October 7, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment V [1791]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor

> be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 49 United States Code, Section 40102(30).

> 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

Title 49 United States Code, Section 40103(a)(1) and (a)(2).

> (a) Sovereignty and Public Right of Transit. —
>
> (1) The United States Government has exclusive sovereignty of airspace of the United States.
>
> (2) A citizen of the United States has a public right of transit through the navigable airspace.

The provisions of 49 U.S.C. § 46301(a) Civil Penalties, 49 U.S.C. § 46316 Criminal Penalty, 49 U.S.C. § 44718 Structures Interfering With Air Commerce, Massachusetts General Laws Chapter 90 § 35B Approach Protection, Massachusetts General Laws Chapter 90 § 44 are lengthy and are therefore set out in Appendix F pursuant to Supreme Court Rule 14.1(f) along with a citation to the Airport Design Advisory Circular 150/5300.

STATEMENT OF THE CASE

Petitioners stand to lose a portion of their private property to the United States as navigable airspaces through which the public has a right of transit. The loss of the right to exclude the public from the petitioners' property includes a boundary fence and land not in dispute between the public use airport and the petitioners.

Petitioners John Breneman and William D. Breneman assert this portion of the surface and at least three feet below the surface of their private real estate has been taken for public use without just compensation in violation of the Fifth Amendment. Alternatively, petitioners claim a portion of their private real estate has been taken by the United States and transferred to an adjacent public use airport for public use by an act of spoliation in violation of the Fifth Amendment. Spoliation is the use of governmental power to transfer private property from one private owner to another for the benefit of the public.

The Act of taking or spoliation occurred on January 5, 2001 when the United States issued two Determinations of Hazard pursuant to 49 U.S.C. § 44718. These Determinations of Hazard by the United States are backed by civil and criminal penalties. These civil and criminal penalties have prevented the petitioners from returning their land to its original condition and from removing illegal buried waste and replacing a hill and a boundary fence at the end of their property. The hill and fence were illegally removed and waste buried at the end of petitioners' property by the owners of the adjacent airport without petitioners' knowledge or permission.

The act of taking or spoliation by the United States on January 5, 2001 imposed a navigational servitude on portions of the surface, above the surface and at least three feet below the surface of petitioners' property as "navigable airspace." This "navigable airspace" claimed by the United States for public use allows the free transit of citizens on the surface, above the surface and at least three feet below the surface of petitioners' property under 49 U.S.C. § 40103(a)(2).

This is not a case that concerns a subjacent landowner attempting to extend property rights into "navigable airspace" by erecting a building or a previously non existing structure. Rather this case presents a vital constitutional question this court has never before addressed: whether the United States can extend its navigable airspace onto and at least three feet below the surface of a landowner's property for a public purpose and thereby prevent a landowner from returning their land to its original condition while denying compensation. Alternatively, can the United States classify a portion of the surface and at least three feet below the surface of private property as, "navigable airspace" and transfer it to a public use airport for the benefit of the public without compensation.

The issues of taking or spoliation of private property have not been addressed by this Court and are vital to uniform national standards of aviation, public safety and the right of landowners to be secure in their property under the public use clause of the Fifth Amendment to the U.S. Constitution. This case presents this Court with a unique opportunity to examine this federal constitutional issue of great significance and examine the oft cited statement that "Determinations of Hazard" have "no enforceable legal effect" in light of decisions and congressional laws that demonstrate such determinations of hazard have the legal effect of depriving

landowners of their right to exclude and the right to possession of their property without compensation. Eminent domain may be a "despotic power" *Vanhorne's Lesser v. Dorrance*, 2 U.S. 304, 312 (1795), but inverse condemnation without compensation makes eminent domain appear the action of enlightened despot.

Petitioners' property existed for at least 40 years with the hill that shielded a boundary fence between the petitioners' property and the Tanner Hiller Airport. The shielding hill and boundary fence limited the use of the Tanner Hiller Airport to small aircraft and gliders and prevented the acquisition, use and taking of "navigable airspace" on the surface, above the surface as well as *below the surface* of petitioners' property irrespective of the length of the single runway at the airport. It further limited the public use of the airport to small aircraft and gliders. The extension of the runway and the taking of new "navigable airspace" paved the way for the introduction of larger, noisier and heavier aircraft.

The Tanner Hiller Airport is a public use airport listed in the Airport Directory of the current Airman's Information Manual. A public use airport is open to the public and consistent with uniform national standards has its flight path ("airspace needed to ensure safety in takeoff and landing of aircraft") comprehensively regulated as "navigable airspace" under 49 U.S.C. § 40102(30). *See also* 14 C.F.R. § 77.1-77.75.

Petitioners' property is not on airport property, is not an airport and has never been listed as an airport in the Airport Directory of the Airman's Information Manual. Petitioners' property has been in their family since about October, 1933

long before the creation of the Tanner Hiller Airport and the 1958 Federal Aviation Act that redefined "navigable airspace" as the airspace above the minimum altitudes of flight prescribed by regulation . . . "including the airspace needed to ensure the safety in the takeoff and landing of aircraft." 49 U.S.C. § 40102(30).

At some unknown date prior to August, 1991[1] the Tanner Hiller Airport illegally altered the existing flight path by removing the shielding hill and boundary fence on petitioners' property and extending the runway, without notice to petitioners', the FAA or the Commonwealth of Massachusetts Aeronautics Commission in violation of the mandatory notice requirements of 14 C.F.R. § 77.13(5)(i). Large quantities of gravel were removed and sold and petitioners' property was excavated from about 4 feet to 20 feet below the elevation of the runway.[2] Illegal solid waste was then buried under petitioners' property and at least 5 acres of petitioners' property were destroyed. In the process the Runway Primary Surface, Runway Object Free area, Runway Protection Zone and Runway Approach Surfaces were extended onto petitioners' property.

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1. An issue of fact was presented in WCV 92-2705 as to the exact date the boundary fence, gravel, trees and hill were removed from petitioners' property and the runway was extended. The case in WCV 92-2705 was for trespass and conversion and not for taking of navigable airspace, as an airport has no power of eminent domain. The exact date of the removal of the boundary fence, gravel, trees and hill remains an issue of fact in the Commonwealth of Massachusetts Appeals Court No. A.C.-2003-P-234 *sub judice*.

2. On land that previously was in all places 4 to 80 feet higher than the elevation of the runway.

About August, 1991 petitioners discovered the damage to their property. Action was instituted in WCV 92-2705 for trespass and conversion. In December, 1997 petitioners discovered and reported a discrepancy in runway length to the FAA. In April, 1998, the FAA received a copy of a letter from MAC advising the Airport Master Record did not correctly note the proper runway length.

For two more years, periodic runway inspections were made and all official publications continued to report the same original runway length and the United States made no attempt to assert a claim to "navigable airspace" on the surface or below the surface of petitioners' property. Petitioners' relied upon the official publications of the FAA and attributed the fact the original runway length remained the same for more than 2 more years was due to the fact the runway had been illegally extended in violation of the mandatory notice requirements of 14 C.F.R. § 77.13. Petitioners remained confident the United States would allow petitioners' to repair their property when the private action between the petitioners, the Tanner Hiller Airport and Amorello Construction Company was completed in WCV 1992-2705. Petitioners relied upon the inaction of the United States.

On or about May 18, 2000, after obtaining a copy of the 61st Edition of the New York Sectional Chart, petitioners' first noticed the United States intended to take their property for the benefit of the public. On June 14, 2000 petitioners filed mandatory notices of proposed construction seeking to return their land to its "original condition" by replacing the hill at the end of their property and erecting a boundary fence and prevent the taking of their property by the United States as "navigable airspace."

In an act of taking or spoliation, the United States without notice or a hearing and upon prompting from the Tanner Hiller Airport, issued a final Order in Aeronautical Study No. 00-ANE-0439-OE on February 15. 2001, that petitioners' replacement hill would constitute a hazard to air navigation. The United States, also without notice or a hearing and upon prompting from the Tanner Hiller Airport, issued a final Order in Aeronautical Study No. 00-ANE-0438-OE on February 23, 2001[3] that petitioners' placement of a 10-foot boundary fence on their property to separate it from the Tanner Hiller Airport would constitute a 13-foot hazard[4] to air navigation because it was on the Runway Primary Surface of the illegally extended runway. The FAA's Determinations of Hazard were appealed and interestingly the United States Court of Appeals for the District of Columbia Circuit affirmed the hill Determination of Hazard on the ground it had no "enforceable legal effect" and decided petitioners lacked standing, hence the court did not accept jurisdiction, to review the fence Determination of Hazard.

Petitioners have sought to have their land returned to them in order to remove the illegal buried waste and return their land to its original condition. Their efforts have been

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3. After previously advising the FAA petitioners did not own the property, the Tanner Hiller Airport dropped its claim of adverse possession one month after the FAA issued its determinations of hazard. *See* Stipulation of Dismissal cover letter and docket entry Appendix E.

4. The 13-foot hazard to air navigation was arrived at by taking the 10-foot high fence and adding a 3-foot below-the-ground penetration to yield a 13-foot hazard to air navigation, thereby deciding "navigable airspace" extends not only on the surface but also at least 3-feet below the surface of petitioners' property.

impeded by jurisdictional issues of competing state and federal regulatory standards[5] and arguments of *res judicata* based on cases and decisions of courts lacking jurisdiction or not accepting jurisdiction to decide issues involving "navigable airspace."

Due to Congressional jurisdictional limitations on Article III Courts, the Court of Federal Claims has jurisdiction to award damages against the United States in excess of $10,000, but does not have jurisdiction to provide equitable relief by removing a Determination of Hazard. *See* 28 U.S.C. § 1346(a)(2). Also significantly, The Court of Federal Claims does not have jurisdiction over actions to quiet title under 28 U.S.C. § 2409a pursuant to 28 U.S.C. § 1346(f).

The United States District Court on the other hand has jurisdiction to grant equitable remedies and has *exclusive* jurisdiction over actions to quiet title under 28 U.S.C. § 2409a, but does not have jurisdiction over actions that involve more than $10,000 against the United States 28 U.S.C. § 1346(a)(2). *See also California v. Arizona*, 440 U.S. 59, 66 (1979). In *California v. Arizona*, the court stated the legislative intent of 1346(f) was clear, namely to "confine jurisdiction to federal courts and exclude the courts of the States" when an action is required to quiet title to an estate or interest in real property in which an interest is claimed by the United States. *Id.* at 66.

Due to these jurisdictional limitations petitioners were forced to bring actions in both the Court of Federal Claims

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5. These State and federal regulatory schemes include civil and criminal penalties for attempting to take back private property that has been identified as "navigable airspace."

and the United States District Court for the District of Massachusetts in an effort to quiet title to their property and have the navigational servitudes removed from their property under 28 U.S.C. § 2409a.

REASONS FOR GRANTING THE PETITION

Three compelling reasons exist for granting the petition for certiorari in this case.

First, conflict exists among the circuits on the same facts of this case as to the legal effect of the Determinations of Hazard. The D.C. Circuit has held the Determinations of Hazard have "no enforceable legal effect' while the Federal Circuit and First Circuit have given legal effect to the Determinations of Hazard in deciding petitioners lost the "right to exclude" or "lost possession" of their property.

Second, the lower courts ignored Supreme Court precedent in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and created an exception to the application of the Constitution in Determination of Hazard cases and applied a regulatory taking analysis instead of a physical taking analysis to support the taking or spoliation. The petition should therefore be granted for the same reason the petition for writ of certiorari was granted in *Kelso, et al. v. City of New London, et al.*, No. 04-108, namely it represents a case where private property was taken by the United States as "navigable airspace" or taken and then transferred to an adjacent property owner for the benefit of the public in an act of spoliation.

Third, the Federal Court improperly concluded the United States took nothing when it included petitioners' property as part of the "navigable airspace" through which citizens have a right of transit under 49 U.S.C. § 40103(a)(2).

I. What Protection Does The Fifth Amendment Provide Against Granting The Public The Right Of Transit And Excluding The Private Landowner From The Surface And Below The Surface Of Private Property By A Federal Agency Enforceable By Federal And State Civil And Criminal Penalties.

A conflict exists among the circuits over the same facts in this case. The United States District Court for the District of Columbia Circuit in No. 01-1165 held determinations of hazard have "no enforceable legal effect." App. 43a. The D.C. Circuit also held petitioners had no standing and hence the court did not take jurisdiction to consider the Determination of Hazard pertaining to the fence and the taking or spoliation of petitioners' property on the ground and at least three feet below the surface of the ground.

The fact that the D.C. Circuit did not take jurisdiction of the fence Determination of Hazard precludes the decision of the D.C. Circuit as being *res judicata* on the taking of petitioners' property on the ground and below the ground. Moreover, the United States' claim to petitioners' property as "navigable airspace" could only be decided by a United States District Court under 28 U.S.C. § 2409a as required by 28 U.S.C. § 1346(f) and not the Federal Aviation Administration. The Federal Aviation Administration could at best claim an interest in petitioners' property, which it did when it issued the Determination of Hazard on January 5, 2001.

The decision of the Court of Federal Claims affirmed by the Federal Circuit is inconsistent with the D.C. Circuit as it concludes the petitioners lost their "right to exclude" others from using their property as their property rights had already

been privately expropriated. Petitioners' property rights were not privately appropriated as the airport previously stipulated in March, 2001 that they did not acquire possession of petitioners' property by adverse possession. This stipulation between private parties effectively had been trumped by the United States in its Determinations of Hazard, which identified petitioners' property as "navigable airspace." A further indication of conflict among the circuits can be found in *Greater Orlando Aviation Auth. v. FAA.*, 939 F.2d 954 (11th Cir. 1991) where the court questioned whether the Determinations of Hazard had no enforceable legal effect.

Petitioners' loss of their "right to exclude" was the result of Government action that appropriated their property for public use as part of the "navigable airspace" over which the United States has exclusive sovereignty by virtue of 49 U.S.C. § 40103(a)(1).

The legal effect of Determinations of Hazard is demonstrated in this case by analysis of 49 U.S.C. § 44718 and more particularly 44718(b) under which the Determinations of Hazard were issued and 49 U.S.C. § 46301(a) providing for civil penalties and 49 U.S.C. § 46316 providing for a criminal penalty. The civil penalties of 49 U.S.C. § 46301(a) exclude sections 44717 and 44719-44723 but do not exclude Section 44718. The criminal penalty in 49 U.S.C. § 46316 excludes only Section 44718(a) but not Section 44718(b) which specifically provided for the issuance of the Determinations of Hazard in this case.

Petitioners, in oral argument before the Federal Circuit pointed out that violation of the Determinations of Hazard also carried civil and criminal penalties under federal law and cited both the civil penalties in 49 U.S.C. § 46301 and the criminal

penalty in 49 U.S.C. § 46316 to demonstrate the Determinations of Hazard in this case have an enforceable legal effect. Both before the Federal Circuit, and the Court of Federal Claims petitioners repeatedly argued the Determinations of Hazard have an enforceable legal effect and repeatedly cited the criminal and civil sanctions backed by separate civil and criminal penalties under the laws of the Commonwealth of Massachusetts Chapter 90 Section 35B and Section 44.

Moreover, the recognition and support for the criminal and civil sanctions as well as the requirement to remove any replacement fence or hill is apparent from Airport Design Advisory Circular 150/5300-13 p. 4 which requires removal of obstructions to air navigation that were the subject of the previous Determinations of Hazard.

Airport Design Advisory Circular 150/5300-13 p. 4 specifically provides that:

> "(6) *14 CFR Part 77 Obstructions to Air Navigation.*
>
> 'Obstructions to air navigation must be removed unless an FAA aeronautical study, based on proposed operations, determined otherwise.'"

In this case the existing Determinations of Hazard based on FAA Aeronautical studies have already determined otherwise. Any replacement fence or hill would now have to be removed.

Removal would be required as the United States has never disclaimed its adverse interest in petitioners' property by rescinding or revoking their Determinations of Hazard as

contemplated by 28 U.S.C. § 2409a. Moreover, the United States District Court of Massachusetts, based on the Court of Federal Claims decision has stated petitioners "lost possession" of their property.

The only reason petitioners could have lost the "right to exclude" and "lost possession" of their property is that it became part of the "navigable airspace" of the United States or was transferred in an act of spoliation by the Determinations of Hazard issued under 49 U.S.C. § 44718 on January 5, 2001.

As pointed out in *United States v. Causby*, 328 U.S. 256 (1946) petitioners have property interests in and above their land. Indeed "[t]he fact that the planes never touched the surface would be . . . irrelevant . . ." *Causby* 328 U.S. at 262. Petitioners; "right to possess and exploit the land — that is to say, [their] beneficial ownership of it — would be destroyed" if planes flying overhead prevented petitioners from using their property." *Id.* at 262.

In this case it is not just the planes that prevent petitioners from using their property. In this case it is the planes and the Government's Determinations of Hazard that prevent petitioners from using their property. These Determinations of Hazard prevent petitioners from using a portion of their property on the ground and below the surface of the ground. on their property. In essence petitioners have been excluded from their own property by the Determinations of Hazard, which extend on the ground and at least three feet below the surface of their property. Moreover, citizens of the United States, pursuant to 49 U.S.C. § 40103(a)(2) have a right of transit through petitioners' property.

Petitioners' loss of the "right to exclude" and the right of exclusive use of their property for the benefit of the public warrant serious consideration under the Fifth Amendment due to available civil and criminal sanctions, both state and federal. The taking of private land by the United States' imposition of a navigational servitude is complete and unless rectified by the Court is inconsistent with the protections afforded landowners under the Fifth Amendment.

II. The Loss Of The "Right to Exclude" Public Use Of The Surface And At Least Three Feet Below The Surface Of Private Property Requires A *Per Se* Takings Analysis Under The Fifth Amendment.

This Court in *Pumpelly v. Greenbay and Mississippi Canal Co.*, 80 U.S. 166 (1872); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and *Loretto Teleprompter v. Manhattan CATV Corp.* 458 U.S. 419 (1982) as well as other cases have distinguished between a physical taking and a regulatory taking case such as *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and its progeny. Indeed, even the Federal Circuit in *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996) observed that liability is a foregone conclusion when the government takes the surface of a private landowner's property "either by its own agents or by third parties" for a public purpose.

Despite clear precedent as to the significance of the taking of the surface of private property triggering a *per se* physical taking analysis, the Court of Federal Claims and the *per curiam* affirmance by the Federal Circuit applied a regulatory taking analysis in granting summary judgment to the United States citing *Cane Tennessee, Inc. v. United States*, 54 Fed. Cl. 100, 104 (2002). *See* App. 34a. In applying a

regulatory taking approach the Court of Federal Claims reviewed *Flowers Mill Assocs. v. United States*, 23 Cl. Ct. 182, 189 (Ct. of Cl. 1991) and progeny to conclude a determination of hazard did not give rise to a taking since such determinations have "no enforceable legal effect" and they promote air safety only through "moral suasion." App. 36a.

The Court of Federal Claims analysis and reliance upon regulatory taking precedent is flawed. This case unlike other cases does not involve an attempt by the landowner to take property from the United States. Instead, this case represents a situation where the United States is taking property from the landowner and including the landowner's property as a part of the "navigable airspace" of the United States. The taking of the petitioners' property, backed by the Determinations of Hazard, take portions of the surface, additional portions above the surface and at least three feet below the surface of petitioners' property. These Determinations of Hazard prevent petitioners from replacing the hill and removing buried waste below the surface of their property. Indeed, the fence determination of hazard even prevents the petitioners from placing a boundary fence between their property and the adjoining airport property.

This is not moral suasion, it is *force majeure*.

The Court of Federal Claims analysis and reliance upon precedent is logically flawed in stating the Determinations of Hazard have "no enforceable legal effect" and then stating petitioners lost their "right to exclude." To the extent petitioners "lost their right to exclude" such right was lost only as a result of the issuance of the Determinations of Hazard by the United States.

The adjacent airport stipulated that it did not own or acquire petitioners' property. This stipulation however was worthless due to the United States' claimed interest in petitioners' property as part of the "navigable airspace" of the United States.

As pointed out in *United States v. City of New Haven*, 496 F.2d 452 (2d Cir. 1974), *cert. denied* and *app. dism'd*, 419 U.S. 958 (1974), once petitioners' property was classified as "navigable airspace" no state court decision could infringe upon or change the right of the United States to control and exercise its sovereignty over this "navigable airspace." Once petitioners' property became part of the "navigable airspace" of the United States, petitioners only option was to seek to clear title to their property under 28 U.S.C. § 2409a. Under 28 U.S.C. § 2409a, actions to quiet title to property in which the United States claims an interest are within the *exclusive original jurisdiction* of the district courts. *See* 28 U.S.C. § 1346(f).

The Court of Federal Claims court was wrong in footnote 16 in concluding a permit was not required to replace the fence and hill. The Commonwealth of Massachusetts granted a request to replace the fence but denied the request to replace the hill. The approval to erect a boundary fence was before the FAA issued their Determinations of Hazard. The denial of the request to replace the hill was based upon the FAA's hill Determination of Hazard. Petitioners should not have to risk the effort to repair the surface and below the surface of their property and then be subjected to the civil and criminal penalties of the Commonwealth of Massachusetts and civil and criminal penalties of federal law in order to substantiate that their property has been seized by an act of the United States as part of the "navigable airspace" of the United States.

The legal effect of the Determinations of Hazard are further complicated by the interplay between state and federal regulations. The Commonwealth of Massachusetts under their regulations approved the erection of the 10 foot boundary fence. This approval under state law is in direct conflict with federal law and would result in a violation of the fence Determination of Hazard and violation of the civil penalties and possibly criminal penalties under federal law. Moreover, replacement of the fence without the shielding hill could result in serious injury and death and result in civil penalties under 49 U.S.C. § 46301 and criminal penalties under 49 U.S.C. § 46316. It is simply unacceptable for the lower courts to brush aside the issue on summary judgment by stating the "statute neither mandates plaintiffs to replace their previously existing hill nor does is require that MAC grant plaintiffs a permit to do so."

The reliance upon regulatory taking analysis precedent by the lower courts is in direct conflict with the *per se* taking analysis of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In both *Kaiser Aetna* and this case the petitioners lost their "right to exclude" citizens from the surface as well as below the surface of their property. Once a landowner has lost the "right to exclude" third parties from the surface of private property by an action of the Government, a *per se* taking analysis applies requiring only a showing the property was taken by the action of the government and the lack of compensation. Both the taking of the surface of the petitioners' property and the lack of compensation have been demonstrated. *Per se* rules are applicable in this case as the petitioners have lost the "right to exclude" which is, "so universally held to be a fundamental property right that falls within this category of interest that the government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (footnote omitted).

III. The Federal Circuit And Court Of Federal Claims Improperly Concluded The United States Took Nothing Since The Public Use Airport Stipulated It Did Not Acquire Rights to Petitioners' Property By Adverse Possession.

The petition in this case should be granted for the same reason the petition for writ of certiorari was granted in *Kelso, et al v. City of New London, et al.*, No. 04-108, namely it represents a case where private property was taken by the United States as "navigable airspace" or was taken and then transferred to an adjacent property owner in an act of spoliation for the benefit of the public.

The lower court's decisions are erroneous in concluding the United States took nothing.

The United States either took "navigable airspace" or first took and then transferred "navigable airspace" to the adjacent airport in an act of spoliation on January 5, 2001 when it issued its Determinations of Hazard. From the stipulation by the Tanner Hiller Airport it is clear the airport did not acquire adverse possession of petitioners' property any time prior to 2001 when it executed around March 30, 2001 and filed the stipulation in WCV 92-2705 on April 2, 2001. The airport therefore did not privately expropriate petitioners' property rights as stated in the opinion of the Court of Federal Claims. *Per contra* the airport specifically disclaimed any rights to petitioners' property after the United States claimed petitioners' property as "navigable airspace." To the extent there has been any private appropriation of petitioners' property rights, it occurred only as a result of the Determinations of Hazard and an act of spoliation or Taking by the United States on or after the issuance of the Determinations of Hazard on January 5, 2001.

To the extent the "navigable airspace" on the ground and below the surface of petitioners' property is part of the "navigable airspace" of the United States this case is directly analogous to *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In *Kaiser Aetna* the United States imposed a navigable servitude and extended its federal authority over additional newly created navigable water and gave the public the right of transit. In a similar manner the United States now includes petitioners' property as part of its 29 million square miles of national airspace of the United States. See *National Airspace Redesign Act April 5, 2000 P.L. 106-181, Title VII*, § 736, Stat. 171 and finding (a)(1) of Congress. Alternatively, the United States in an act of spoliation has created the appearance the petitioners' property somehow belongs to or is part of the Tanner Hiller Airport for the benefit of the public.[6]

The lower courts improperly interpreted and relied upon *Griggs v. Allegheny County*, 369 U.S. 84 (1962) as approving the use of the power of the federal government to authorize a taking or transfer of petitioners' private property for the benefit of the public or another private party. This use of Government power constitutes either a taking or an unconstitutional act of spoliation. *See Nichols On Eminent Domain*, Third Edition (2004), Vol. 2A § 7.01{4}. The use of the power of the federal government to transfer petitioners' "right to exclude" and "right of possession" of their property

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6. All the determinations of hazard cases relied upon by the lower court, namely *Flowers Mill* and progeny are inapplicable as they all represent an effort by the landowners to extend their rights into the "navigable airspace" that is part of the public domain. Moreover, all of these cases do not represent the taking by the Government of the surface and below the surface of a landowner's property and do not trigger a *per se* taking analysis.

to an adjacent landowner for a public use is unconstitutional. *Cole v. LaGrange*, 113 U.S. 1, 5 (1885); *Madisonville T. Co. v. St. Bernard M. Co.*, 196 U.S. 239, 251-252 (1905) (fundamental in American Jurisprudence that private property cannot be taken by government, national or state except for purposes which are of public character — such taking must be accompanied by compensation).

Spoliation or the taking of property from one private owner for another private owner for the benefit of the public is also contrary to the laws of the Commonwealth of Massachusetts. *Opinion of the Justices*, 331 Mass. 771, 120 N.E.2d 198 (Mass. 1954); *In re Opinion of the Justices*, 297 Mass. 567, 8 N.E.2d 753, 758 (Mass. 1937) and *Wright v. Walcott*, 238 Mass. 423, 131 N.E. 291 (Mass. 1921). A fundamental principal is that the superior power of the government cannot be exercised to take private property from one landowner for the benefit of another. As stated in *Wright v. Walcott*:

> Private property cannot be taken by eminent domain or by contract of purchase except for a public use. It cannot be so taken or purchased from one person or set of persons with the design of handing it over directly or indirectly to another person or set of persons for their private advantage. 131 N.E. at 292.

Griggs v. Allegheny County, 369 U.S. 84 (1962) properly interpreted stands for the proposition that low landings and takeoff flights by airplanes to and from a public use airport constitute a "taking" of an air easement for which compensation must be paid. The effect of the lower court's interpretation and application of *Griggs* is to provide for the

taking or transfer of petitioners' private property to the Tanner Hiller Airport and pole vault the takings clause of the Fifth Amendment. The problems inherent in such an approach is that it ignores the fact that "navigable airspace" is under the exclusive sovereignty of the United States Government 49 U.S.C. § 40103(a)(1) before it could be transferred to the airport. The second problem with the lower court's interpretation and application of *Griggs* is that it would condone the unconstitutional act of spoliation.

Unfortunately it was all too easy for the lower courts to ignore the Fifth Amendment to the U.S. Constitution and rely on *stare decisis* that incorrectly hold Determinations of Hazard have no enforceable legal effect and pay lip service to cited decisions of this Court pertaining to the taking of the surface of private property. Like dogma, it is easy to cite the scriptures that the winds came from the four corners of the earth to erroneously conclude the earth is flat and brand anyone as a heretic or having chutzpah for claiming the evidence shows otherwise. It is time to consider the Determinations of Hazard have an enforceable legal effect and can result in a *per se* taking.

This Court has the power, responsibility and indeed the obligation to demonstrate there are no exceptions to the Constitution when it comes to taking the surface and at least three feet below the surface of private property for a public use.

CONCLUSION

For the foregoing reasons, petitioners respectfully request the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED MAY 10, 2004

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-5156

JOHN BRENEMAN and WILLIAM D. BRENEMAN,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

In CASE NO(S). 02-CV-1854

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MAYER, *Chief Judge*, MICHEL and LINN, *Circuit Judges*):

AFFIRMED. *See* Fed. Cir. R. 36.

Appendix A

ENTERED BY ORDER OF THE COURT

s/ Jan Horbaly,
Jan Horbaly, Clerk

DATED MAY 10 2004

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED AUGUST 6, 2003

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-1854 L

(Filed: August 6, 2003)

Fifth Amendment Takings; Motion to Dismiss; 28 U.S.C. 1500 (1994); Complaint Filed in District Court and Court of Federal Claims on Same Day; Summary Judgment; Claim of Takings of Avigation (Air) Easement by FAA by Publication of Aeronautical Chart and Issuance of Hazard Determination

JOHN BRENEMAN and WILLIAM D. BRENEMAN

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Appendix B

OPINION AND ORDER

This case is before the court on defendant's motion to dismiss for lack of subject matter jurisdiction or, in the alternative, failure to state a claim. Plaintiffs seek compensation for defendant's physical taking and imposition of a servitude upon plaintiffs' property through the publication of an aeronautical chart and the issuance of two hazard determinations by the United States acting through the Federal Aviation Administration (FAA or defendant), an administration within the Department of Transportation. *See* Complaint (Compl.) ¶ 4[1]; 49 U.S.C. § 106(a) (2003).

I. Background[2]

Plaintiffs' property is located in the towns of New Braintree and Barre in central Massachusetts. Compl. ¶ 10. The property has been owned by plaintiffs' family since 1933. *Id.* ¶ 11. The portion of plaintiffs' property that is situated in New Braintree is now adjacent to the Tanner Hiller (formerly Hiller) Airport (Airport). Compl. ¶¶ 10, 12. The Airport,

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1. The court has before it Defendant's Motion to Dismiss (Def.'s Mot.); Defendant's Appendix of Exhibits to its Motion to Dismiss (Def.'s Ex.); Plaintiffs['] Opposition to Defendant's Motion to Dismiss (Pls.' Opp.); Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss (Def.'s Reply); Plaintiffs' Sur-Reply Pursuant to Court Order Entered June 12, 2003 (Pls.' Sur-Reply); Defendant's Response to Court's Order of July 9, 2003 (Def.'s Resp.); and Plaintiffs' Response to Court's July 9, 2003 Order (Pls.' Resp.).

2. Facts cited to the pleadings of only one of the parties do not appear to be in dispute.

initially developed in or around 1950, is a single runway public use airport listed in the Airport Directory of the current Airman's Information Manual published by FAA. Compl. ¶¶ 9, 12; *see also* 14 C.F.R. § 77.2 (1971) (defining a public use airport as an airport that is open to the general public with or without a prior request to use the airport). Both the Airport and plaintiffs' property are, for the most part, undeveloped. Def.'s Ex. 5 (*Breneman v. Wolfson,* No. WCV 922705, 1999 WL 1203920, at *1 (Mass.Super.Ct. Oct. 21, 1999) (*Wolfson*)).

For some forty years, plaintiffs' property and the Airport existed side by side separated by a boundary fence (the fence) approximately 350 feet beyond one end of the runway on the edge of plaintiffs' property. Compl. ¶ 12. A hill (the hill) on plaintiffs' property was behind the fence. *Id.* Then, at a date prior to August 1991, the Airport caused the removal of trees, the hill, and the fence on plaintiffs' property in order to extend the runway to a point closer to the boundary with plaintiffs' property. *Id.* ¶ 13; *see also* Def.'s Ex. 5 (*Wolfson,* 1999 WL 1203920, at *1). The Airport extended the runway approximately 200 feet. Compl. ¶ 11; Def.'s Mot. at 4. The runway currently ends about 150 feet from the edge of plaintiffs' property. *Id.*

After plaintiffs discovered the alterations to their property in August, 1991, they brought suit in the Superior Court of Massachusetts against the Airport and its contractor for trespass, conversion, the wrongful removal of trees, and for unfair or deceptive business practices. Def.'s Mot. at 3; Def.'s Ex. 5 (*Wolfson,* 1999 WL 1203920, at *1) (suit against

Airport); Def.'s Ex. 6 (*Breneman v. Tanner*, No. 922705, 1999 WL 1336436, at *1 (Mass.Super.Ct. Feb. 1, 1999) (*Tanner*) (suit against contractor)). The Superior Court found that the extension of the runway complained of by plaintiffs "was completed by September 1988" and that the runway "was in use by the end of 1988." Def.'s Mot. at 3; *Tanner*, 1999 WL 1336436, at *1-*2. The court granted motions for summary judgment filed by both the Airport and its contractor, holding that plaintiffs' claims were barred by the applicable statute of limitations or, alternatively, that they were precluded by a state statute of repose. Def.'s Mot. at 3; Def.'s Ex. 6 (*Tanner*, 1999 WL 1336436, at *2-*3) (granting contractor's motion to dismiss); Def.'s Ex. 5 (*Wolfson*, 1999 WL 1203920, at *3-*5) (granting Airport's motion for summary judgment as to all of plaintiffs' claims, but denying Airport's motion for summary judgment on its adverse possession claim). Plaintiffs state that they are currently pursuing appeals from these adverse judgments. Compl. ¶ 16.

In or about December 1997, plaintiffs discovered and reported to FAA a discrepancy between the runway length as reported in the Airport Directory of the then current Airman's Information Manual and plaintiffs' measurement of the runway pursuant to discovery obtained in *Wolfson*. Compl. ¶ 20. FAA wrote in a reply to plaintiffs on April 7, 1998, that it "did not correctly note the latest measured runway length." Exhibits to Plaintiffs ['] Opposition to Defendant's Motion to Dismiss (Pls.' Opp. Ex.) D. FAA apologized to plaintiffs on behalf of the Massachusetts Aeronautics Commission

(MAC)[3] "for any inconvenience this may have caused."[4] *Id.* Then, on May 18, 2000, FAA published the 61st Edition of the New York Sectional Chart,[5] an aeronautical navigation chart used to aid pilots in, *inter alia,* takeoffs and landings. Compl. ¶ 25; *see* Def.'s Mot. at 4. The New York Sectional Chart accurately indicates that the airport lies 584 feet above sea level, that the runway is now approximately 3000 feet long,[6] and that the airport does not have an air traffic control

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3. MAC is a state transportation agency under the Massachusetts Executive Office of Transportation and Construction. http://www.massaeronautics.org/. It is responsible for airport development and improvements, aviation safety, aircraft accident investigation, navigational aids, and statewide aviation planning. *Id.* MAC also certifies airports and heliports, licenses airport managers, conducts annual airport inspections, and enforces Massachusetts safety regulations. *Id.* MAC works in partnership with FAA and state and local government to manage the financial resources necessary to maintain Massachusetts' airports. *Id.*

4. FAA further noted in its letter that the Airport's manager, not MAC, "is ultimately responsible for verifying all data listed . . . and is also responsible for notification to the FAA." Pls.' Opp. Ex. D. By copy of the letter to the Airport, "the MAC . . . request[ed] that the airport manager make such changes as necessary" to verify the correct runway length. *Id.*

5. Although plaintiffs originally discovered the discrepancy in the actual measured runway length and the length published by FAA through their examination of the Airport Directory of the Airman's Information Manual, the basis for their takings claim rests on FAA's publication of the New York Sectional Chart. *See* Compl. ¶ ¶ 17, 18.

6. The previous New York Sectional Chart (60th Edition) indicated a runway length at the Airport of approximately 2800 feet. Def.'s Mot. at 4 n. 3 (citing Def.'s Ex. 8).

tower. Def.'s Mot. at 4 (citing Def.'s Ex. 7). Plaintiffs allege that this publication was an "approval [by defendant] of the illegal extension of the runway" which resulted in defendant's physical taking of plaintiffs' property. Compl. ¶ 37.

On June 14, 2000, after learning of the May 18, 2000 publication of the New York Sectional Chart, plaintiffs filed notices of proposed construction pursuant to 14 C.F.R. § 77.13 (1972) (requiring notice of proposed construction in airport approach areas). Compl. ¶ 25. Plaintiffs alleged that they sought to return their land to its "original condition" by replacing the hill at the end of their property and re-erecting the ten-foot boundary fence. Pls.' Opp. at 6. Plaintiffs state that returning their land to its "original condition" is "required" by Mass. Gen. Laws ch. 131 § 40 (1996)[7] and that, pursuant to Mass. Gen. Laws ch. 90 § 44 (1941) they

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7. Section 40 of Chapter 131 of the Massachusetts General Laws governs the removal, filling, dredging, or altering of hazardous waste on land that is affecting, *inter alia,* the public, private, and ground water supply. Pls.' Opp. Ex. A. While plaintiffs have expressed concern in their complaint that their property might be in violation of Section 40, plaintiffs filed minutes of an August 15, 2001 meeting before MAC in which the MAC Commissioners "asked Mr. Breneman if there are any documents currently on file, or any record noting that hazardous waste is on his property." Pls.' Opp. Ex. J at 8. The minutes stated that "Mr. Breneman said that nobody has come out to see the area." *Id.* There is no evidence or even any allegation of any action taken by the Commonwealth of Massachusetts with respect to plaintiffs' property under this statute. Even if plaintiffs could be in some way damaged by enforcement of this statutory regime and defendant could be in some way responsible therefor, such damage is entirely speculative in this case and the court declines to consider it further.

face civil and criminal penalties for not doing so. Compl. ¶¶ 25, 29, 30; Pls.' Opp. at 14; *see* Pls.' Opp. Exs. A, B.

Pursuant to Section 44718 of Title 49 of the United States Code, FAA issued an Order in Aeronautical Study on February 15, 2001, which determined that plaintiffs' replacement hill would constitute a hazard to air navigation. Compl. ¶ 26; Pls.' Opp. at 6; Def.'s Ex. 10. FAA further determined on February 23, 2001 that plaintiffs' replacement of the ten-foot fence would constitute a thirteen-foot hazard to air navigation.[8] Compl. ¶ 26; Pls.' Opp. at 7; Def.'s Ex. 10.

Plaintiffs appealed FAA's hazard determinations to the United States Court of Appeals for the District of Columbia. *Breneman v. FAA,* 30 Fed.Appx. 7 (D.C.Cir.2002). The court held that plaintiffs lacked standing to challenge the FAA determination with regard to the fence because they did "not establish [] that the purely advisory determination prevents them from going ahead with the project." *Id.* at 7-8 (citing *Aircraft Owners & Pilots Ass'n v. FAA,* 600 F.2d 965, 966-67 (D.C.Cir.1979)) ("Once issued, a hazard/no-hazard determination has no enforceable legal effect. The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation." (footnote omitted)).

8. The thirteen-foot hazard to air navigation was arrived at by FAA by adding to the ten feet of proposed fence height an expected three-foot penetration of the fence into ground, yielding a thirteen-foot hazard determination. Pls.' Opp. at 7 n. 4 (citing Pls.' Opp. Ex. G). Plaintiff alleges that this determination has resulted in taking their property interests not only on and above the ground, but "*below the ground* as 'navigable airspace.'" Pls.' Opp. at 21; Compl. at 2.

As to the hill, however, the court found that plaintiffs had standing. *Breneman v. FAA*, 30 Fed.Appx. at 8. The court found standing because plaintiffs had submitted an affidavit indicating that, although pursuant to Mass. Gen. Laws ch. 90 § 35B (1965), the MAC had determined that a permit was not necessary to erect the proposed fence, the MAC had denied plaintiffs' request for a permit to build the hill "due at least in part to [FAA's] hazard determination." *Id.;* Compl. ¶ 27. The court found that plaintiffs' inability to rebuild their hill was at least fairly traceable to the challenged hazard determination for standing purposes. *Breneman v. FAA*, 30 Fed.Appx. at 8 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992)). The court then found "no merit to [plaintiffs'] claim that the determination is arbitrary and capricious or otherwise contrary to law" and affirmed FAA's determination as to the hill. *Breneman v. FAA*, 30 Fed.Appx. at 8.

On December 13, 2002, plaintiffs filed suit in this court alleging that, "[t]he May 18, 2000 action of the FAA in concert with their subsequent final orders and actions alone and in combination with the related actions of the []MAC based upon the FAA's determination of hazard has resulted in the unlawful and unauthorized physical taking of plaintiffs' property . . . ." Compl. ¶ 28. Plaintiffs seek damages in the form of just compensation for this alleged taking. Compl. at 18 (¶ ¶ A-F).

Also on December 13, 2002, plaintiffs filed suit against FAA, MAC, and the Airport in the United States District

Court for the District of Massachusetts.[9] *See* Def.'s Ex. 2. In that action, plaintiffs seek, *inter alia,* equitable relief, airport closure, invalidation of state and federal procedures, quiet title, and damages for inverse condemnation. *See* Pls.' Opp. at 13; Def.'s Ex. 2 at 42-46.

Defendant moves to dismiss plaintiffs' complaint for lack of subject matter jurisdiction under 28 U.S.C. § 1500 because plaintiff filed its claims in this court and the District Court in Massachusetts on the same day. Def.'s Mot. at 1. Alternatively, defendant moves to dismiss for failure to state a claim under Rule 12(b)(6) of the Court of Federal Claims (RCFC).

II. Discussion

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

In ruling on a motion to dismiss, this court is generally "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States,* 60 F.3d 795, 797 (Fed.Cir.1995) (citing

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9. Plaintiffs have submitted an affidavit of Chris A. Paulsen, Esq., which describes how plaintiffs filed their complaint in this court between 1:00 and 2:00 PM EST on December 13, 2002, and then at 2:45 PM EST on December 13, 2002 in the U.S. District Court for the District of Massachusetts. *See* Pls.' Opp. Ex. L; Pls.' Opp. at 10-11. Plaintiffs have also submitted a copy of the cover of the complaint in the U.S. District Court for the District of Massachusetts with a time stamp displaying "2:45". *See* Pls.' Opp. Ex. M. This court does not use time stamps when filing complaints.

Scheuer v. Rhodes, 416 U.S. 232, 236-37 (1974)). However, plaintiff, as the non-moving party, bears the burden of establishing jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed.Cir.1988).

Here, the court must determine whether plaintiffs' claim should be dismissed pursuant to 28 U.S.C. § 1500 (1994), which states:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

In order to determine whether § 1500 applies, the court must first examine whether plaintiffs, when they filed in this court, had "pending in any other court any suit or process against the United States . . . ." 28 U.S.C. § 1500. The court will analyze this by determining when plaintiffs claims were filed here and in the Massachusetts District Court. As discussed in more detail below, *infra* nn. 6-7, the second prong of the § 1500 analysis examines whether a plaintiff asserted the "same claims" both here and in the district court. *See Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545,

1554 n. 23 (Fed.Cir.1994).[10] Defendant would have the court examine both prongs independently. *See* Def.'s Mot. at 10; Def.'s Reply at 1-3. However, if the court determines that plaintiffs did not have a suit "pending", 28 U.S.C. § 1500, against the United States in another court when they filed in this court, the court need not address the "same claim" issue because the timing issue is dispositive of this court's jurisdiction. *See Hardwick Bros. Co. II v. United States,* 72 F.3d 883, 886 (Fed.Cir.1995); *Teegarden v. United States,* 42 Fed.Cl. 252, 255 (1998). The court therefore first examines the plaintiffs' time of filing in both courts.

Defendant argues that same-day filings should be treated as "simultaneous" for the purposes of § 1500. Def.'s Repl. at 1 (citing *United States v. County of Cook,* 170 F.3d 1084, 1090-91 (Fed.Cir.1999)). Defendant argues that "the 'simultaneous' filing of complaints in federal district court and in the Court of Federal Claims operates to divest the Court of Federal Claims of jurisdiction." Def.'s Mot. at 9. This treatment, defendant argues, is consistent with the purpose of § 1500, which is to "'protect the United States

10. After finding that the plaintiffs in *Loveladies Harbor* had filed suit in this court while an action was "pending" in the district court, the Federal Circuit then examined whether the plaintiffs' "claims" were the same in both courts. *Loveladies Harbor,* 27 F.3d at 1551. The court provided a "working definition of 'claims' for the purposes of applying § 1500," *id.,* holding that "[f]or the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the *same operative facts,* and must seek *the same relief.*" *Id.* Because the claim in the district court sought "distinctly different" relief than the claim in this court, this court was not divested of jurisdiction under § 1500. *Id.* at 1554.

from having to defend two lawsuits over the same manner simultaneously' by forcing plaintiffs to choose which court to pursue their claims in." Def.'s Reply at 1 (quoting *County of Cook,* 170 F.3d at 1090-91) (citation omitted). Moreover, although the District Court in Massachusetts time-stamps complaints when they are filed, Pls.' Opp. Ex. M, this court stamps only the date of the filing. Def.'s Reply at 2. Regardless of what *time* plaintiffs filed their complaint, defendant argues, this court should not be required to change its record-keeping structure or hold an evidentiary hearing to ascertain the precise timing of same-day filings, as that would unnecessarily complicate the court's procedure and "effectively eviscerate the statute." Def.'s Reply at 2-3.

Plaintiffs argue that they filed their complaint in this court *before* they filed in the United States District Court for the District of Massachusetts, thus no claim was "pending" at the time the complaint was filed in this court. Pls.' Opp. at 11. Therefore, the subsequent filing does not divest this court of jurisdiction. *Id.* Plaintiffs contend that "[t]he issue of time of filing . . . 'depends upon the state of things at the *time* in determining jurisdiction of the action [is][sic] brought.'" Pls.' Opp. at 9 (quoting *County of Cook,* 170 F.3d at 1090). Thus, because they filed in this court at an earlier *time* than they filed in the Massachusetts District Court, plaintiffs' complaint should not be dismissed for lack of subject matter jurisdiction under § 1500. *See* Pls.' Opp. at 11.

The caselaw regarding the time of filing claims here and in a district court and the subsequent jurisdictional effect of § 1500 on those claims is not clearly dispositive of the issue

of same-day filing. Plaintiffs cite this court's opinion in *Tecon Engineers* for the proposition that the later filing of a claim in district court does not divest this court of jurisdiction. *See* Pls.' Opp. at 10 (citing *Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943 (1965)) (filing in this court prior to filing in district court). In *Tecon Engineers*, this court found that the language of § 1500 did not

> provide for a disruption of this court's lawful jurisdiction by the mere filing of a petition in the District Court on the same claim that is then actually pending here. The words "shall not have jurisdiction" pertain solely to the acquiring or taking of jurisdiction by this court when the same plaintiff *already* "has pending in any other court" another suit on the same claim. Not only is the legislative history of Section 1500 devoid of any intimation to the contrary; its legal evolution in the Congress supports our conclusion.

Tecon Engineers, 343 F.2d at 946 (quoting 28 U.S.C. § 1500) (emphasis added).

However, the United States Court of Appeals for the Federal Circuit criticized *Tecon Engineers* in its decision in *UNR Industries, Inc. v. United States*, 962 F.2d 1013, 1023 (Fed.Cir.1992), *aff'd sub nom. Keene Corp. v. United States*, 508 U.S. 200 (1993). In order to remedy a statute "rife with judicially created exceptions and rationalizations to the point that it no longer serves its purposes," *UNR Industries*, 962 F.2d at 1021, the Federal Circuit held, *inter alia*, that "if the same claim is filed in another court after the complaint

is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction." *Id.* Thus, because the goal of § 1500 is "to force an election of forum and prevent simultaneous dual litigation against the government," *id.*, "Tecon is overruled." *Id.* at 1023.

The law regarding § 1500 and time of filing was not settled after *UNR Industries,* however. Although the United States Supreme Court affirmed *UNR Industries* on appeal, the Court held that it did not have to overrule *Tecon Engineers* to do so, inasmuch as the Court's decision "turns on Keene's earlier filed District Court actions, and even Keene now concedes it to be 'unnecessary for the Court to address the *Tecon* question' in ruling on the dismissal of Keene's claims." *Keene Corp. v. United States,* 508 U.S. at 216. Thus, the Court did "not decide whether [§ 1500] also continues to bar a plaintiff from prosecuting a claim in the Court of Federal Claims while he has pending a later-filed suit in another court . . . ." *Id.* at 209 n.4 (citations omitted).

In *Loveladies Harbor,* the Federal Circuit sitting *en banc* stated that "[a]s the Supreme Court has reminded us, anything we said in *UNR* regarding the legal import of cases whose factual bases were not properly before us was mere dictum, and therefore we will not accord it stare decisis effect." *Loveladies Harbor,* 27 F.3d at 1549. The following year, the Federal Circuit removed any remaining doubt as to the appeal court's view: "After *UNR/ Keene* and *Loveladies [Harbor], Tecon Engineers* remains good law and binding on this court." *Hardwick Bros. Co. II,* 72 F.3d at 886. Thus, "Hardwick's later-filed district court action did not deprive the Court of Federal Claims of jurisdiction over Hardwick's contract claim." *Id.*

Appendix B

Following *Hardwick,* this court recently stated that "[t]he sum of these cases leads us to conclude that the same action filed in district court prior to being filed in the Court of Federal Claims divests the latter of jurisdiction, as do actions filed simultaneously, but actions filed in district court subsequent to the Court of Federal Claims filing are not considered 'pending' in the language of Section 1500, and thus do not divest this court of jurisdiction." *Spodek v. United States,* 44 Fed.Cl. 32, 41 (1999). Furthermore, this court has added that "'pendancy,' for purposes of applying section 1500, is measured as of the *time* of the filing of the Court of Federal Claims action." *Vaizburd v. United States,* 46 Fed.Cl. 309, 311 (Fed.Cl.2000) (emphasis added) (citing *Keene,* 508 U.S. at 207); *see also Loveladies Harbor,* 27 F.3d at 1548 ("The question of whether another claim is 'pending' for purposes of § 1500 is determined at the *time* at which the suit in the Court of Federal Claims is filed . . . .") (emphasis added).

Here, defendant asks the court to hold that actions filed in this court and another on the same day be treated as "simultaneous" for the purposes of § 1500. Def.'s Reply at 1. Thus, defendant contends, the rule articulated in *Spodek* should apply and this court should be divested of its jurisdiction to hear plaintiffs' claim. *Id.* Defendant fails to cite, and the court has not found, any case law which deals with the exact issue in this case. Defendant relies on *County of Cook,* which held that "the 'filing' of the same claim simultaneously in the district court and the Court of Federal Claims by operation of § 1631 deprives the latter court of jurisdiction pursuant to § 1500." *County of Cook,* 170 F.3d at 1091. However, because that case dealt with claims which

had been filed together in the federal district court, some of which were transferred from the district court to the Court of Federal Claims pursuant to 28 U.S.C. § 1631 while some remained in the district court, *County of Cook* is distinguishable from this case. *See id.* at 1090. Indeed, the Federal Circuit noted in *County of Cook* that "[s]ection 1631 mandates that the transferred claims be treated as if they were filed in the transferee court at the *time* they were filed in the transferor court." *Id.* at 1091 n. 8 (emphasis added). Thus, the plaintiff's claims in that case were truly filed "simultaneously" with respect to the claims not transferred and remaining in the district court. Accordingly, the court ruled that § 1500 precluded jurisdiction over the claims in the Court of Federal Claims given the pendency of the other claims before the district court. *Id.* at 1092.

The Federal Circuit briefly had before it the issue of same-day filing of complaints in *Richmond, Fredericksburg, & Potomac Railroad Company v. United States,* 75 F.3d 648, 653 (Fed.Cir.1996). However, the plaintiff amended its complaint in this court while the district court's dismissal was on appeal in the Fourth Circuit, and thus "[b]ecause the district court suit and the suit in the Court of Federal Claims under the amended complaint did not seek the same relief, 28 U.S.C. § 1500[did] not apply." *Id.* (citation omitted). The court therefore noted, "Since we find that the jurisdictional flaw was subsequently cured, we need not address the question of whether, though filed on the same day, the suit in the Court of Federal Claims might have been the first filed and therefore possibly entitled to the benefit of the rule in *Tecon Engineers.*" *Id.* at 653 n.2 (citations omitted).

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It is the court's opinion that plaintiffs here should be entitled to the benefit of the rule in *Tecon Engineers.* Plaintiffs have submitted the affidavit of Chris A. Paulsen, Esq., which describes plaintiffs' filing of their complaint in this court between 1:00 and 2:00 p.m. EST on December 13, 2002, and then in the United States District Court for the District of Massachusetts at 2:45 p.m. EST on December 13, 2002. *See* Pls.' Opp. Ex. L; Pls.' Opp. at 10-11. Plaintiffs have also submitted a copy of the cover of the complaint in the United States District Court for the District of Massachusetts with a time stamp displaying "2:45." *See* Pls.' Opp. Ex. M. The preponderance of the evidence, *see Reynolds,* 846 F.2d at 748, favors a finding that there was not "pending in any other court any suit or process against the United States," 28 U.S.C. § 1500, at the time plaintiffs filed their complaint here.[11]

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11. Because the court finds that plaintiffs did not have a claim "pending" in the federal district court for the District of Massachusetts when they filed in this court, the court need not address whether their "claims" are the same in both courts for the purposes of § 1500. Cases in this court that have involved later-filed district court actions have not been dismissed for lack of jurisdiction under § 1500 even if both claims were the same. *See Hardwick,* 72 F.3d at 885 (holding that the later-filed district court action did not divest this court of jurisdiction even though the court below had "found that there was 'no material difference' in the operative facts in the two actions" and were the "same claims" for the purposes of § 1500); *Teegarden,* 42 Fed.Cl. at 255 n. 3 ("The court is not persuaded by plaintiff[s'] assertion that the later-filed district court claim arises from a different set of operative facts than does the claim filed in this court .... [H]owever, despite defendant's assertion to the contrary, plaintiffs' claim should not be dismissed merely because both claims arise from the same operative facts."). These cases instruct that the court retains

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B. Motion to Dismiss for Failure to State a Claim or Motion for Summary Judgment

RCFC 12(b)(6) governs the dismissal of a claim for "failure to state a claim upon which relief can be granted." RCFC 12(b)(6). A motion under RCFC 12(b)(6) "addresses 'the question of whether in a specific case a court is able to exercise its general power with regard to the facts peculiar to the specific claim.'" *Crawford v. United States*, 53 Fed.Cl. 191, 192 (2002) (quoting *Palmer v. United States*, 168 F.3d 1310, 1313 (Fed.Cir.1999)). Under RCFC 12(b)(6), the court must accept as true the facts alleged in the complaint, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999), and must construe all reasonable inferences in favor of the non-movant, *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed.Cir.2001). A court must grant the motion "when the facts asserted by the plaintiff do not entitle him to a legal remedy." *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed.Cir.2000). A dismissal under RCFC 12(b)(6) "constitutes an adjudication on the merits of a claim." *Crawford*, 53 Fed.Cl. at 192 (citing *Maniere v. United States*, 31 Fed.Cl. 410, 419 (1994)).

A motion to dismiss for failure to state a claim upon which relief can be granted is treated as a motion for

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jurisdiction because plaintiffs filed their complaint here before filing in the district court. Once the court finds that plaintiffs' claim was first filed in this court, defendant's motion to dismiss for lack of subject matter jurisdiction must be denied, regardless of whether plaintiffs' later-filed action involved the same claim as defined for purposes of § 1500. *Hardwick*, 72 F.3d at 885; *Teegarden*, 42 Fed.Cl. at 255.

summary judgment under Rule 56 if "matters outside the pleadings are presented to and not excluded by the court." RCFC 12(b)(6). Both parties included materials outside of the pleadings in their briefing. Therefore, the court addresses defendant's motion as a motion for summary judgment under Rule 56.

Under Rule 56, summary judgment is warranted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact that might significantly affect the outcome of the litigation is material. *Anderson,* 477 U.S. at 248. Disputes over facts that are not outcome determinative will not preclude the entry of summary judgment. *Id.* at 247-48.

The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). If the moving party demonstrates an absence of a genuine issue of material fact, the burden then shifts to the non-moving party to show that a genuine issue exists. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed.Cir.1987). The movant is also entitled to summary judgment if the non-movant fails to make a showing sufficient to establish an element of its case on which it will bear the burden of proof at trial. *Celotex,* 477 U.S. at 322-23. The court must resolve any doubts about factual issues in favor of the party opposing summary judgment, *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed.Cir.1985), to whom the benefits of all favorable inferences and presumptions run. *H.F. Allen Orchards v.*

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United States, 749 F.2d 1571, 1574 (Fed.Cir.1984), *cert. denied*, 474 U.S. 818 (1985).

1. Publication of an Aeronautical Chart

Plaintiffs argue that defendant claimed rights to "navigable airspace" over and on plaintiffs' property when, on May 18, 2000, FAA published the 61st Edition of the New York Sectional Chart recognizing the Airport's extended runway. Pls.' Opp. at 17. This, plaintiffs contend, subjected their property to a "navigable servitude" and caused it to come under exclusive federal control and regulation. *Id.* at 18. Plaintiffs argue that defendant's action constitutes a physical taking of plaintiffs' property by transferring newly and illegally created "navigable airspace" from plaintiffs to the public. *Id.* at 3.

Defendant argues that the publication of the New York Sectional Chart is not a final agency action or decision that regulates, restricts, limits, or prohibits the use of plaintiffs' property in any manner. Def.'s Mot. at 14-15. Furthermore, defendant argues, the publication of the updated New York Sectional Chart merely provides an accurate depiction of the existing runway length of the Airport and does not represent "approval" of the Airport's allegedly illegal extension of its runway in 1988. *Id.* at 15. For these reasons, defendant argues that plaintiffs' claim based on FAA's aeronautical chart publication should be dismissed for failure to state a claim. *Id.*

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As the Federal Circuit has stated, the analysis of a takings claim involves two steps:

> First a court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a "stick in the bundle of property rights." If a plaintiff possesses a compensable property right, a court proceeds to the second step. Under that second step, a court determines whether the governmental action at issue constituted a taking of that "stick."

Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1374 (Fed.Cir.2000) (citing *M & J Coal Co. v. United States,* 47 F.3d 1148, 1154 (Fed.Cir.1995)).

Thus, the court must first determine whether plaintiffs possessed a compensable property interest that was allegedly taken by the publication of the New York Sectional Chart. The court then determines whether that publication in fact amounted to a taking of plaintiffs' property interest.

In the leading case in this area of takings jurisprudence, *United States v. Causby,* 328 U.S. 256 (1946), the Supreme Court held that the United States "has 'complete and exclusive national sovereignty in the airspace . . . .'" *Id.* at 260 (quoting 49 U.S.C. § 176(a) *repealed by* Federal Aviation Act of 1958, Pub.L. 85-726, title XIV § 1401(a), 72 Stat. 731, 806 (1958)). The Court added that United States citizens have a "'a public right of freedom of transit in air commerce through the navigable airspace of the United States . . . .'"

Id. (quoting 49 U.S.C. § 403, *repealed by* Federal Aviation Act of 1958, Pub.L. 85-726, title XIV § 1401(b), 72 Stat. 731, 806 (1958)). At the time of the *Causby* case, Congress had placed the navigable airspace in the public domain, defining it as "airspace above the minimum safe altitudes of flight prescribed" by the Civil Aeronautics Administration. *Id.* at 263. Thus, "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.* at 266. In *Causby,* the court found that low flights of military planes over a chicken farm made the property unusable for the owner's purpose. *Id.* at 267. The Court therefore held that there had been a taking of an air easement for which compensation must be paid. *Id.*

Causby was the first in a series of cases in which plaintiffs were able successfully to sue the government for a compensable taking for flights by government aircraft in the public domain that are so frequent and low as to constitute a direct, immediate, and substantial interference with the use and enjoyment of the subject property. *See, e.g., Adaman Mut. Water Co. v. United States,* 143 Ct.Cl. 921, 931-34 (1958) (finding a compensable taking of plaintiffs' property based on interferences with plaintiffs' use and enjoyment of property as a result of noise made and disturbances created by government aircraft after the extension of a runway); *Mid-States Fats & Oils Corp. v. United States,* 159 Ct.Cl. 301, 331-32 (1962) (finding a compensable taking based on the reactivation of a military airbase adjacent to plaintiff's property with frequent flights of low-flying military aircraft); *Bacon v. United States,* 155 Ct.Cl. 441, 443 (1961) (same); *A.J. Hodges Indus., Inc. v. United States,* 174 Ct.Cl. 259,

262 (1966) ("The courts have held that when regular and frequent flights by Government-owned aircraft over privately owned land at altitudes of less than 500 feet from the surface of the ground constitute a direct, immediate, and substantial interference with the use and enjoyment of the property, there is a taking by the Government of an avigation easement, or easement of flight, in the airspace over the property, and that this taking is compensable under the Fifth Amendment to the Constitution."); *Argent v. United States,* 124 F.3d 1277, 1279 (Fed.Cir.1997) (same). Thus, the general rule from the *Causby* line of cases is that "low altitude flights which unreasonably interfere with the use and enjoyment of the land represent a trespass or partial taking creating a right of compensation," *County of Westchester v. Town of Greenwich, Conn.,* 793 F.Supp. 1195, 1204 (S.D.N.Y.1992), *rev'd on other grounds,* 9 F.3d 242 (2d Cir.1993), and "[e]ven when such flights fall within the navigable airspace, and therefore use of this low altitude airspace is authorized, compensation is still required for the taking." *Id.* Absent from this line of cases is any finding of a taking related to the mere creation or recognition of navigable airspace, as is claimed here.

Following the decision in *Causby,* Congress enacted the Federal Aviation Act of 1958, Pub.L. 85-726, 72 Stat. 731 (1958), which redefined "navigable airspace" as the "airspace above the minimum altitudes of flight prescribed by regulations . . . , including airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. § 40102(a)(30) (2000). Shortly thereafter, the Supreme Court heard another "air easement" (also termed "avigation easement") case. *Griggs v. Allegheny County,* 369 U.S. 84 (1962). In *Griggs,* the plaintiff alleged a taking of an air

easement over its property, which was located beneath the takeoff and landing paths of an airport runway. 369 U.S. at 86-87. The airport was owned by Allegheny County, Pennsylvania, which had obtained the land on which the airport was built with aid provided in part by the federal government. *Id.* at 86. The government agreed to share from 50% to 75% of the "allowable project costs," *id.* (quoting 49 U.S.C. § 1109, *repealed by* Airport and Airway Development Act of 1970, Pub.L. 91-258, title I § 52(a), 84 Stat. 235 (the 1970 Act)), including the " 'costs of acquiring land or interests therein or easements through or other interests in air space . . . .'" *Id.* (quoting 49 U.S.C. § 1112(a)(2), *repealed by* the 1970 Act). Moreover, Allegheny County was required by statute to obtain permission from the Civil Aeronautics Administrator (CAA) to set up its runways in the locations that it did. *Id.* at 85-86 (citing 49 U.S.C. § 1108, *repealed by* the 1970 Act). The plaintiff in *Griggs* argued that there was a taking and that the airlines or the CAA acting as an authorized representative of the United States, rather than the airport operator, was responsible. *Id.* at 89. The Supreme Court rejected this argument, stating:

> We think, however, that respondent [airport operator], which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority

> which decides to build an airport *vel non*, and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built.

Id. (internal footnote omitted). Thus, even though the United States provided funding for the airport and specifically granted the airport permission to place its runways in the places that it did, the Supreme Court found that it was the airport operator who "took" the plaintiff's property and not the federal government. *Id.* Indeed, it was the airport operator who built the airport, placed the runways, and leased to airlines the right to take off and land over the plaintiff's property. *Id.* at 86. The federal government "takes nothing" in such a situation. *Id.* at 89. As defendant argues, *see* Def.'s Mot. at 11-12, the United States' involvement in this matter through the mere publication of the New York Sectional Chart is quite different and even less active than the government involvement rejected by the court as a basis for a taking in *Griggs*.

Plaintiffs have suggested no authority which supports their claim that the publication of the New York Sectional Chart, or indeed any FAA aeronautical chart, could constitute a compensable taking. "Aeronautical charts are highly technical tools. They are graphic depictions of technical, mechanical data. The best analogy to an aeronautical chart is a compass. Both may be used to guide an individual who is engaged in an activity requiring certain knowledge of natural features." *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir.1991).

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The New York Sectional in particular is published by FAA's National Aeronautical Charting Office (NACO). Def.'s Mot. at 4; Def.'s Ex. 7 p. 77. NACO publishes approximately 37 of these sectional charts covering the continental United States and portions of Canada and Mexico. Def.'s Mot. at 4. Coordination with the Department of Defense and other agencies is often required. http://www.naco.faa.gov/index.asp?xml=naco /about. Many charts are revised and published every 28 days. *Id.* FAA is authorized, but not required, to publish such charts. *Reminga v. United States,* 631 F.2d 449, 452 (6th Cir.1980) (citation omitted).

Although not required by law to do so, when FAA does arrange "for the publication of aeronautical navigation charts and engenders reliance on them, it is required to use due care to see that they accurately depict what they purport to show." *Id.* In *Reminga,* the court viewed it as critical for safety and navigation purposes that the charts accurately depict airport runway lengths and locations, height and location of obstructions, and other information required by pilots. *See id.;* Def.'s Mot. at 4. Indeed, if FAA exercises its discretion to issue such charts and is negligent by failing to locate hazards or accurately depict runways, courts have held that the government should be held liable for such negligence if it causes injury or damage. *See Reminga,* 631 F.2d at 452 (finding government liable when TV tower's ground location was depicted inaccurately on chart); *Allnutt v. United States,* 498 F.Supp. 832, 835 (W.D.Mo.1980) (finding government liable when chart failed to depict existing power transmission line). Thus, it is very important that FAA accurately represent the existing conditions on the ground when it publishes aeronautical navigation charts. Each year, therefore,

"thousands of changes in information affecting the safety of navigable airspace are made with the sole purpose of maintaining certified and safe airspace." http://www.naco.faa.gov/index.asp?xml=naco /about.

An aeronautical navigation chart is therefore merely an accurate depiction of relevant obstructions or conditions in existence at the time of the publication. *Reminga,* 631 F.2d at 452. While plaintiffs do have property interests in their land, to the extent that these interests were interfered with or taken, it was not through FAA's publication of the New York Sectional Chart.[12] The court does not see how such a publication could possibly physically appropriate or "take" plaintiffs' land.

Plaintiffs also have some property interests in the airspace *above* their land. Indeed, "[t]he fact that the planes never touched the surface would be . . . irrelevant . . . ." *Causby,* 328 U.S. at 262. Plaintiffs' "right to possess and exploit the land-that is to say, [their] beneficial ownership of it-would be destroyed" if planes flying overhead prevented plaintiffs from using their property. *Id.* at 262.

The only cases, however, in which the government causes the imposition of a "navigable servitude" through the taking of a plaintiff's property interest "above the ground" are those in which the flight of *government* aircraft is "so low and so frequent as to be a direct and immediate interference with

12. Plaintiffs' alternative theory, that FAA's hazard determinations amounted to a taking of their property "on, above, and *below the ground,*" Compl. at 2; Pls.' Opp. at 21, is addressed below in Part II.B.2.

the enjoyment and use of [plaintiff's] land." *Causby*, 328 U.S. at 266; *see also Hero Lands Co. v. United States*, 1 Cl.Ct. 102, 104 ("[S]o long as flights by government-owned aircraft through the airspace above land do not interfere substantially with the use and enjoyment of the property, the Government is not liable to the landowner for the taking of an avigation easement . . . ."), *aff'd*, 727 F.2d 1118 (Fed.Cir.1983), *cert. denied*, 466 U.S. 972 (1984). Thus, it is the *use* by the government of navigable airspace that can amount to a taking of a plaintiff's property and not merely the government's *recognition* of the existence of the navigable airspace. In the case of mere recognition, "[t]he Federal Government takes nothing." *Griggs*, 369 U.S. at 89.

Finding no authority supporting a taking claim based on the publication of an aeronautical chart, plaintiffs seek to analogize the present case to *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In *Kaiser Aetna*, the petitioners were the owners of a shallow, privately operated pond that was not connected to any navigable waterway and not subject to a federal navigational servitude. *Id.* at 166. In 1961, the petitioners dredged a channel to connect the pond with a bay and the Pacific Ocean, both navigable bodies of water. *Id.* at 167. The petitioners increased the average depth of the channel from two to six feet and created accommodations for pleasure boats, thereby creating a marina. *Id.* Furthermore, the petitioners made improvements to allow boats from the marina to enter and return from the bay, as well as to provide for better water conditions. *Id.* The petitioners controlled all access to and use of the marina, charged an access fee for customers' entrance, and generally did not permit other commercial use of the marina. *Id.* at 168.

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Then, in 1972, a dispute arose between the *Kaiser Aetna* petitioners and the United States Army Corps of Engineers (Corps) concerning whether the petitioners were required to obtain the Corps' permission to make future improvements and whether the petitioners were precluded from denying the public access to the pond because, as a result of the improvements, the pond had become a navigable water of the United States. *Id.* The dispute ripened into a lawsuit by the U.S. Government against the petitioners in the United States District Court for the District of Hawaii, which held that the pond was now "navigable water of the United States" and thus subject to regulation by the Corps under § 10 of the Rivers and Harbors Appropriation Act. *United States v. Kaiser Aetna,* 408 F.Supp. 42, 55 (D.Haw.1976), *aff'd in part and rev'd in part,* 584 F.2d 378, 384 (9th Cir.1978). On appeal, the Court of Appeals for the Ninth Circuit found that the navigational servitude also required the petitioners to grant the public access to the pond, but held that this did not require just compensation to the petitioners by the government. *United States v. Kaiser Aetna,* 584 F.2d 378, 384 (9th Cir.1978), *rev'd,* 444 U.S. 164, 180 (1979). The Supreme Court reversed, holding that the government, in making its determination that the petitioners' once-private pond must now be a "public aquatic park," had taken the plaintiffs' right to exclude. *Id.* at 180. Accordingly, the Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Id.* at 179-180.

Plaintiffs here note that "[t]he taking in *Kaiser Aetna* occurred *not* in *1961* when the pre-existing channel was

dredged out but in *1972* when a dispute arose and the Federal Government imposed its 'navigable servitude' upon the private pond." Pls.' Sur-Reply at 7. Therefore, plaintiffs contend, "As in *Kaiser Aetna,* the taking of the Plaintiffs' property occurred not on the date the new navigable airspace was created but on the date the United States imposed its navigable servitude upon the property." *Id.* The court believes that plaintiffs' analogy is misplaced. In *Kaiser Aetna,* navigable waters were not in fact "created" in 1961 through the dredging of the channel and creation of the marina. Indeed, the petitioners in *Kaiser Aetna* had the right to exclude others throughout the 1960s and until the Corps' determination and the subsequent court order in the 1970s. *See Kaiser Aetna,* 444 U.S. at 168. Thus, it was only after the Corps made its determination that the pond was subject to public access as "navigable waters" that the petitioners' property rights were expropriated.

In contrast, plaintiffs here have not excluded anyone or anything, including the Airport or its traffic, since the Airport's extension of the runway before August 1991. Plaintiffs appear to be correct when they state that "the creation of new 'navigable airspace' by the removal of the shielding hill on Plaintiffs' property has destroyed ... their 'right to exclude'. . . ." Pls.' Opp. at 18. To the extent that plaintiffs' "right to exclude" was taken, however, it was through no action of the United States. Unlike the Corps' determination and the subsequent court order in *Kaiser Aetna,* FAA's publication of the New York Sectional Chart had no effect on plaintiffs' existing property rights, nor did it alter plaintiffs' use of their property or their "right to exclude" others from it. These property rights had already been

privately expropriated. FAA did not, as plaintiff contends, "open[ ] to the public the extension of the runway of the Tanner Hiller Airport with the publication of the 61st edition of the New York Sectional Chart." Compl. ¶ 18. The runway was *already* open to the public. An aeronautical chart is descriptive. Unlike an exercise of federal power through a determination by the Corps, the publication of an aeronautical chart does not operate to create a public right in formerly private property. *See Griggs,* 369 U.S. at 89.

2. FAA Hazard Determinations

Plaintiffs' takings claim is also premised on FAA's issuance of the two hazard determinations in February 2001. Compl. ¶ 4. Plaintiffs argue that "[t]he February 15, 2001 and February 23, 2001 final orders of the FAA together with the actions of the []MAC and provisions of [Mass. Gen. Laws ch.] 90 § 44 provide for the use of plaintiffs' property by others and constitutes [sic] an unlawful taking of their property under the Fifth Amendment of the Constitution of the United States." *Id.* FAA's hazard determinations, plaintiffs allege, prevent them from returning their land to its "original condition" as mandated by Mass. Gen. Laws ch. 131 § 40 and cause them to face criminal and civil penalties under Mass. Gen. Laws ch. 90 § 44. *Id.* ¶ ¶ 25, 29. Because the MAC denied plaintiffs a permit to "replace the hill to restore their land to its 'original condition' based in part upon the FAA's determination of hazard," *id.* ¶ 27, plaintiffs argue that FAA is responsible for the physical taking of their property. *Id.* ¶ 28.

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Notwithstanding plaintiffs' characterization of the alleged taking as a physical one, the law provides that "[w]hen the nature of the government action does not constitute a physical [occupation] of [the subject] property but, rather, limits the use a property owner may make of his property," a regulatory taking analysis is appropriate. *Cane Tennessee, Inc. v. United States,* 54 Fed.Cl. 100, 104 (2002). "[T]he classic analytical tool for assessing whether a [regulatory] taking has occurred is the three-part test developed by the Supreme Court in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978)." *Id.* In particular, the court must examine the character of the governmental action, the economic impact on the claimant, and the extent to which the governmental action has interfered with distinct investment-backed expectations. *See Penn Central,* 438 U.S. at 124; *Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211, 212 (1986); *Cienega Gardens v. United States,* 331 F.3d 1319, 1337 (Fed.Cir.2003); *Avenal v. United States,* 100 F.3d 933, 938 (Fed.Cir.1996). In this case, the conflict centers on the nature of the governmental action.

Defendant argues that hazard determinations "are advisory only, have no legal effect, and do not—standing alone—give rise to a takings claim against the United States." Def.'s Reply at 8. Defendant relies chiefly on *Flowers Mill Assocs. v. United States,* 23 Cl.Ct. 182, 189 (1991) for the proposition that a hazard determination "cannot be the basis for a Fifth Amendment taking claim against the government."

Thus, defendant argues, plaintiffs' claim must be dismissed for failure to state a claim. Def.'s Mot. at 14.[13]

In *Flowers Mill,* this court squarely addressed whether the FAA's issuance of a hazard determination can give rise to a taking. The facts of *Flowers Mill* are very similar to the facts of this case. The plaintiff owned land adjacent to a privately-owned airport. *Flowers Mill,* 23 Cl.Ct. at 183-84. The plaintiff proposed to construct a one-story building on its property that was to be located approximately 700 feet from the end of the airport runway. *Id.* In compliance with federal law pursuant to 14 C.F.R. § 77.11(a), the plaintiff notified FAA of this proposed construction. *Id.* at 184. FAA then conducted an aeronautical study concerning the effect of the plaintiff's proposed building on the safe and efficient use of the airport. *Id.* Thereafter, FAA issued a "Determination of Hazard to Air Navigation," finding that "because the proposed structure would have a substantially adverse effect on the safe and efficient use of airspace by aircraft, it would be a hazard to air navigation . . . ." *Id.* at 185. The plaintiff appealed the FAA's decision to the Court of Appeals for the Third Circuit, but the decision was upheld by that court in an unpublished opinion. *Flowers Mill Assocs. v. FAA,* 888 F.2d 1379 (3d Cir. Oct.12, 1989) (unpublished). The plaintiff then filed suit in this court, alleging that FAA's hazard determination amounted to a taking of its property under the Fifth Amendment without just compensation. *Flowers Mill,* 23 Cl.Ct. at 185. The plaintiff argued that the

13. Neither party has suggested a binding precedent on this issue and the court has located none. The court has examined numerous state and federal authorities of a non-precedential nature, all of which are consistent with each other and with the court's conclusion.

hazard determination effected a taking as a practical matter because it was unable to obtain the necessary financing and insurance to commence the construction as a result of the FAA's determination. *Id.* at 189. As here, the government moved to dismiss for failure to state a claim. *Id.* at 183.

The court in *Flowers Mill* noted that "[t]he issue of whether an FAA determination that a proposed structure presents a hazard to air navigation constitutes a regulatory taking is apparently one of first impression in the Claims Court and the Federal Circuit." *Id.* at 186. Accordingly, the court closely examined the FAA's regulatory process prior to determining the constitutional question before it. In so doing, the court noted a D.C. Circuit case which observed that a hazard/no-hazard determination had "no enforceable legal effect":

> Once issued, a hazard/no-hazard determination has no enforceable legal effect. The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation . . . . Primarily . . . the determination promotes air safety through 'moral suasion' by encouraging the voluntary cooperation of sponsors of potentially hazardous structures.

Id. (quoting *Aircraft Owners and Pilots Ass'n v. FAA*, 600 F.2d 965, 967 (D.C.Cir.1979)). Therefore, although the court stated that "'moral suasion' is a considerably potent force in our society," *id.* at 187, and that "it is obvious that this determination would have constituted a considerable 'stumbling block' to the proponents," *id.*, the court held that

"[t]his type of government action is fundamentally different from the physical destruction or intrusion on property attendant to an act of eminent domain. Consequently, it cannot be the basis for a Fifth Amendment taking claim against the government." *Id.*

Indeed, despite the inability of the plaintiff in *Flowers Mill* to obtain the necessary financing and insurance to commence construction as a result of the hazard determination, the plaintiff had conceded that "FAA's determination is technically only advisory and that no permit from FAA is required." *Id.* at 189. Thus, the court held that "[e]ven assuming that Flowers Mill has been damaged by inability to develop its property in the manner intended because third parties relied on FAA's determination, FAA still has not acted in any way to interfere with plaintiff's property rights." *Id.* at 189-90.

The Pennsylvania Superior Court reached a similar conclusion in 1993. *Commonwealth v. Rogers*, 634 A.2d 245, 252 (1993). The *Rogers* court held that an FAA hazard determination "was advisory only and not legally enforceable." *Id.* The court observed that "[a] landowner is not required to obtain a permit from FAA before proceeding with development, and FAA has no power to prevent construction," *id.*, and concluded that "the FAA action cannot be the basis of a Fifth Amendment taking because of the voluntary nature of the regulatory scheme." *Id.* at 252-53 (citing *Aircraft Owners and Pilots Ass'n*, 600 F.2d 965); *see also 3775 Genesee St., Inc. v. State*, 415 N.Y.S.2d 575, 579 (N.Y.Ct.Cl.1979) ("The FAA cannot issue a cease and desist order preventing construction. It can only seek

voluntary compliance by a private landowner.") (citations omitted).

FAA's hazard determinations have also been examined in a takings context by the Court of Claims of New York, which determined that a finding of hazard is advisory only and cannot constitute a taking. *Kupster Realty Corp. v. State*, 404 N.Y.S.2d 225, 231 (N.Y.Ct.Cl.1978). The *Kupster Realty* court concluded that local airport operators who actually commit the act of taking neighboring land, *see id.* (citing *Griggs*, 369 U.S. at 89-90), or state agencies that actually can enforce orders prohibiting construction, can be held responsible for a landowner's loss of property rights due to adjacent airport actions, but that FAA could not be similarly held responsible. *Id.*

Consistent with the foregoing authorities, the court finds that FAA's determinations of hazard based on plaintiffs' proposed construction of a hill and fence on their property do not amount to a taking under the Fifth Amendment. FAA's hazard determinations simply have "no enforceable legal effect. The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation." *Flowers Mill*, 23 Cl.Ct. at 186 (quoting *Aircraft Owners and Pilots Ass'n*, 600 F.2d at 967). As stated in *Flowers Mill*, "FAA's determination is technically only advisory and . . . no permit *from FAA* is required." *Flowers Mill*, 23 Cl.Ct at 189 (emphasis added).[14] To the extent that plaintiffs were

14. Plaintiffs have provided no evidence for their claim, *see* Pls.' Opp. at 3-4, that they are or will be subject to civil or criminal penalties under Mass. Gen. Laws ch. 90 § 44 for not returning their

(Cont'd)

denied their property rights, it was because of MAC's denial of a permit and not because of any action by FAA. Even if MAC relied on FAA's hazard determination in deciding not to issue a permit to build the hill, it was not required to do so. This is evidenced by the fact that MAC did not prohibit plaintiffs from building the proposed fence on their property even after FAA's determination of hazard with regard to it. Plaintiffs' argument here is closely analogous to the plaintiff's argument in *Flowers Mill.* Just as the court there declined to find a taking because FAA's hazard determination influenced a third party to deny the plaintiff adequate insurance and financing, the court here declines to find a taking by FAA because of MAC's denial of a permit. Of course, the court expresses no opinion on whether MAC's denial of a permit to build a hill on plaintiffs' property could support a takings claim against MAC.

(Cont'd)

land to its "original condition." Mass. Gen. Laws ch. 90 § 44 provides civil and criminal penalties for violations of Mass. Gen. Laws ch. 90 § § 35-52 (1965). Plaintiffs allege that FAA's hazard determinations caused MAC to deny plaintiffs a permit to build the hill which is "otherwise legally mandated by [Mass. Gen. Laws ch.] 90 § 35D" and thus plaintiffs are subject to these penalties. Pls.' Opp. at 3 (citing Pls.' Opp. Ex. B at 4). However, Mass. Gen. Laws ch. 90 § 35D merely states that it does not "prohibit the . . . replacement . . . of any structure" existing before approach protection provisions required their removal. Pls.' Opp. Ex. B at 4. The statute neither "mandates" plaintiffs to replace their previously existing hill nor does it require that MAC grant plaintiffs a permit to do so. Even if Mass. Gen. Laws ch. 90 § § 35 and 44 could somehow be viewed as plaintiffs suggest, the court has concluded that FAA's hazard determination does not impose any legal requirement that could constitute a taking.

Appendix B

III. Conclusion

For the foregoing reasons, defendant's motion to dismiss under Rule 12(b)(1) is DENIED and defendant's motion for summary judgment is GRANTED. The Clerk of the Court shall enter judgment for defendant. Each party shall bear its own costs.

IT IS SO ORDERED.

s/ Emily C. Hewitt
Emily C. Hewitt
Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED AUGUST 7, 2003

IN THE
UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-1854 L

JOHN BRENEMAN AND WILLIAM D. BRENEMAN,

V.

THE UNITED STATES

JUDGMENT

Pursuant to the court's Published Opinion and Order filed August 6, 2003.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of the defendant and the complaint is dismissed. Each party shall bear its own costs.

Brian Bishop
Acting Clerk of Court

By: s/ [illegible]
Deputy Clerk

August 7, 2003

APPENDIX D — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED FEBRUARY 26, 2002

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1165

September Term, 2001

John Breneman and William D. Breneman,

Petitioners

v.

Federal Aviation Administration,

Respondent

Consolidated with 01-1166

On Petitions for Review of an Order of the
Federal Aviation Administration

Before: Tatel and Garland, *Circuit Judges*, and Silberman, *Senior Circuit Judge*.

JUDGMENT

These cases were considered on the record before the Federal Aviation Administration and on the briefs and oral arguments by counsel.

Appendix D

Petitioners lack standing to challenge the FAA's determination that proposed construction of a fence on property near the Tanner-Hiller Airport in New Braintree, Massachusetts would be "hazard[ous] to air navigation." 14 C.F.R. § 77.35(c). Petitioners have not established that the purely advisory determination prevents them from going ahead with the project. *See Aircraft Owners & Pilots Ass'n v. FAA*, 600 F.2d 965, 966-67 (D.C. Cir. 1979) ("Once issued, a hazard/no-hazard determination has no enforceable legal effect. The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation." (footnote omitted)). As a result, we cannot see how the myriad injuries of which Petitioners complain are "fairly traceable" to the challenged determination. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992) (holding that to establish standing, a plaintiff must "allege (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief" (internal quotation marks and citations omitted)).

Petitioners have, however, established standing to challenge the FAA's separate determination that construction of a hill on the same property would create an air navigation hazard, as they submitted an affidavit indicating that the Commonwealth of Massachusetts Aeronautics Commission denied their request for a permit to build the hill due at least in part to the hazard determination. Breneman Aff. para. 4; *see also D & F Afonso Realty Trust v. Garvey*, 216 F.3d 1191, 1194 (D.C. Cir. 2000) (finding standing under similar circumstances). Nevertheless we find no merit to Petitioners' claim that the determination is arbitrary and capricious or otherwise contrary to law. To begin with, the decision to

grant administrative review of a hazard determination is committed to agency discretion, *see* 14 C.F.R. § 77.37(c) ("The Administrator examines each petition and decides whether a review will be made[.]"), and is therefore insulated from judicial review under the Administrative Procedure Act, *see, e.g.*, *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 735 (D.C. Cir. 2001). As for the merits of the hazard determination, we think the fact that sixty-two feet of the proposed hill would rise above the Tanner-Hiller Airport's "approach surface," J.A. at 83, is sufficient to support the FAA's findings that the hill would adversely affect air traffic and that the effects would be substantial—and in turn that the hill would be a hazard, *see D & F Afonso*, 216 F.3d at 1195 (listing the required elements of a hazard determination). Moreover, Petitioners dispelled any lingering doubts on the issue—and ran afoul of this court's chutzpah doctrine, *see, e.g.*, *Caribbean Shippers Ass'n v. Surface Transp. Bd.*, 145 F.3d 1362, 1365 n.3 (D.C. Cir. 1998) (invoking the doctrine); *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991) (citing the "legal definition of chutzpah: chutzpah is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan")—when they conceded at oral argument that they *intend* to build the hill in part to impede air traffic at the Airport.

We have considered Petitioners' constitutional challenges to the FAA's hill determination and find them equally without merit.

Appendix D

Accordingly, it is ORDERED that the Petitioners' challenge to the fence determination be dismissed for lack of standing, and that the FAA's hill determination be affirmed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX E — STIPULATION OF DISMISSAL ENTERED IN WCV 1992-2705 ENTERED ON APRIL 2, 2001

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT DEPARTMENT
of the TRIAL COURT
DOCKET NO. 92-2705

WILLIAM D. BRENEMAN and JOHN BRENEMAN

Plaintiffs

vs.

JOHN M. WOLFSON, EXECUTOR OF THE ESTATE OF LEONARD TANNER

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Now come the parties in the above-entitled matter and hereby stipulate to the dismissal as to the **Counterclaim for Adverse Possession** only, without prejudice.

Appendix E

RESPECTFULLY SUBMITTED,

William D. Breneman
and John Breneman,
By Their Attorney,

s/ James C. Donnelly
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By His Attorney,

s/ Richard T. Tucker
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APPENDIX F — RELEVANT STATUTES

Title 49 United States Code, Section 46301(a).
CIVIL PENALTIES

(a) **General penalty.** (1) A person is liable to the United States Government for a civil penalty of not more than $1,000 for violating–

(A) chapter 401 [49 USCS §§ 40101 et seq.] (except sections 40103(a) and (d), 40105, 40116, and 40117), chapter 411 [49 USCS §§ 41101 et seq.], chapter 413 (except sections 41307 and 41310(b)-(f)), chapter 415 (except sections 41502, 41505, and 41507-41509), chapter 417 (except sections 41703, 41704, 41710, 41713, and 41714), chapter 419 [49 USCS §§ 41901 et seq.], subchapter II or III of chapter 421 [49 USCS §§ 42111 et seq. or 42121], chapter 441 [49 USCS § § 41101 et seq.] (except section 44109), 44502(b) or (c), chapter 447 (except sections 44717 and 44719-44723), chapter 449 (except sections 44902, 44903(d), 44904, 44907(a)-(d)(1)(A) and (d)(1)(C)-(f), and 44908), or section 47107(b) (including any assurance made under such section) of this title;

(B) a regulation prescribed or order issued under any provision to which clause (A) of this paragraph applies;

(C) any term of certificate or permit issued under section 41102, 41103 or 41302 of this title; or

(D) a regulation of the United States Postal Service under this part [49 USCS §§40101 et seq.].

(2) A person operating an aircraft for the transportation of passengers or property for compensation (except an airman serving as an airman) is liable to the Government for a civil penalty of not more than $10,000 for violating–

(3) A civil penalty of not more than $10,000 may be imposed for each violation under paragraph (1) of this subsection related to–

(A) the transportation of hazardous material;

(B) the registration or recordation under chapter of 441 of this title [49 USCS §§ 44101 et seq.] of an aircraft not used to provide air transportation;

(C) a violation of section 44718(d), relating to the limitation on construction or establishment of landfills;

(D) a violation of section 44725, relating to the safe disposal of life-limited aircraft parts; or

(E) a violation of section 41705, relating to discrimination against handicapped individuals . . . .

Title 49 United States Code, Section 46316 General criminal penalty when specific penalty not provided.

(a) **Criminal penalty.** Except as provided by subsection(b) of this section, when another criminal penalty is not provided under this chapter (49 USCS §§ 46301 et seq.), a person that knowingly and willfully violates this part [49 USCS §§ 40101 et seq.], a regulation prescribed or order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to

security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) under this part [49 USCS §§ 40101 et seq.], or any term of a certificate or permit issued under section 41102, 41103, or 41302 of this title shall be fined under title 18. A separate violation occurs for each day the violation continues.

(b) **Nonapplication.** Subsection (a) of this section does not apply to chapter 401 [49 USCS §§ 40101 et seq.] (except sections 40103(a) and (d), 40105, 40116, and 40117), chapter 441 [49 USCS §§ 44101 et seq.] (except section 44109), chapter 445 [49 USCS §§ 44501 et seq.], chapter 447 [49 USCS §§ 44701 et seq.] (except section 44718(a)), and chapter 449 [49 USCS §§ 44901 et seq.] (except sections 44902, 44903(d), 44904, and 44907-44909) of this title.

Appendix F

Title 49 United States Code, Section 44718.

Structures interfering with air commerce

(a) Notice. – By regulation or by order when necessary, the Secretary of Transportation shall require a person to give adequate public notice, in the form and way the Secretary prescribes, of the construction, alteration, establishment, or expansion, or the proposed construction, alteration, establishment, or expansion, of a structure or sanitary landfill when the notice will promote –

(1) safety in air commerce; and

(2) the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports.

(b) Studies. – (1) Under regulations prescribed by the Secretary, if the Secretary decides that constructing or altering a structure may result in an obstruction of the navigable airspace or an interference with air navigation facilities and equipment or the navigable airspace, the Secretary shall conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment. In conducting the study, the Secretary shall

consider factors relevant to the efficient and effective use of the navigable airspace, including –

(A) the impact on arrival, departure, and en route procedures for aircraft operating under visual flight rules;

(B) the impact on arrival, departure, and en route procedures for aircraft operating under instrument flight rules;

(C) the impact on existing public-use airports and aeronautical facilities;

(D) the impact on planned public-use airports and aeronautical facilities; and

(E) the cumulative impact resulting from the proposed construction or alteration of a structure when combined with the impact of other existing or proposed structures.

(2) On completing the study, the Secretary shall issue a report disclosing completely the extent of the adverse impact on the safe and efficient use of

the navigable airspace that the Secretary finds will result from constructing or altering the structure.

(c) Broadcast Applications and Tower Studies. – In carrying out laws related to a broadcast application and conducting an aeronautical study related to broadcast towers, the Administrator of the Federal Aviation Administration and the Federal Communications Commission shall take action necessary to coordinate efficiently -

(1) the receipt and consideration of, and action on, the application; and

(2) the completion of any associated aeronautical study.

(d) Limitation on Construction of Landfills. –

(1) In general. – No person shall construct or establish a municipal solid waste landfill (as defined in section 258.2 of title 40, Code of Federal Regulations, as in effect on the date of the enactment of this subsection) that receives putrescible waste (as defined in section 257.3-8 of such title) within 6 miles of a public airport that has received grants under chapter 471 and is primarily served by general aviation

aircraft and regularly scheduled flights of aircraft designed for 60 passengers or less unless the State aviation agency of the State in which the airport is located requests that the Administrator of the Federal Aviation Administration exempt the landfill from the application of this subsection and the Administrator determines that such exemption would have no adverse impact on aviation safety.

(2) Limitation on applicability. – Paragraph (1) shall not apply in the State of Alaska and shall not apply to the construction, establishment, expansion, or modification of, or to any other activity undertaken with respect to, a municipal solid waste landfill if the construction or establishment of the landfill was commenced on or before the date of the enactment of this subsection.

Massachusetts General Laws Chapter 90 Section 35B
Approach Protection

No person shall erect or add to the height of any structure within a rectangular area lying fifteen hundred feet on either side of the extended center line of a runway or landing strip of an airport approved by the commission for a distance of two miles from the end of such runway or landing strip

so that the height thereof will be more than one hundred and fifty feet above the level of such runway or landing strip, nor, within that portion of such area which is within a distance of three thousand feet from the end of such runway or landing strip, so that the height thereof will be greater than a height above the level of such runway or landing strip determined by the ratio of one foot vertically to every twenty feet horizontally measured from the end of such runway or landing strip, unless a permit therefor has been granted by the commission.

The provisions of this section shall not apply (1) to areas subject to airport approach regulations adopted pursuant to sections forty A to forty I, inclusive, (2) to air approaches to the General Edward Lawrence Logan International Airport, nor (3) to structures which will be thirty feet or less in height above ground.

Massachusetts General Laws Chapter 90 Section 44 Penalties

Any person failing to comply with any requirement, or violating any provision, of sections thirty-five to fifty-two, inclusive, or the rules and regulations for the enforcement of said sections made by the commission, or airport approach regulations made by a city or town under section forty A, and in full force and effect, shall be punished by a fine of not less than ten nor more than five hundred dollars, or by imprisonment for

not less than one month nor more than six months, or both. Whoever operates an aircraft while under the influence of intoxicating liquor shall be punished by imprisonment for not less than one month nor more than two years.

Airport Design Advisory Circular 150/5300-13

(6) 14 CFR Part 77 Obstructions to Air Navigation.

Obstructions to air navigation must be removed unless an FAA aeronautical study, based on proposed operations, determined otherwise. . .